
DATE: January 18, 1996
CASE NOS. 93-ERA-34
93-ERA-36

IN THE MATTER OF

KURT R. ZINN,

COMPLAINANT,

v.

UNIVERSITY OF MISSOURI,

RESPONDENT,

and

J. STEVEN MORRIS,

COMPLAINANT,

v.

UNIVERSITY OF MISSOURI,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under Section 211, the employee protection provision, of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1988 & Supp. V 1993).[1] Before me for review is the Recommended Decision and Order (R. D. and O.) issued on May 23, 1994, by the Administrative Law Judge (ALJ). The ALJ concluded that Respondent, University of Missouri (the University), had violated the ERA by taking adverse action against Complainants Kurt R. Zinn (Zinn) and J. Steven Morris[2] (Morris) in retaliation for engaging in activity protected under the ERA. The ALJ also recommended that the University be ordered to take appropriate action to remedy its demotion of Morris and its refusal to initiate the process for formal consideration of Zinn for promotion. By Preliminary Order issued June 20, 1994,

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and pursuant to Section 211(b)(2)(A) of the ERA, I ordered the University to comply with the ALJ's recommended order of relief for the Complainants, and to do so immediately, rather than ten days following issuance of the Secretary's final order, as had been provided by the R. D. and O.[3]

Following a thorough review of the record and the arguments of the parties, I basically agree with the findings of fact and the ultimate conclusions of the ALJ. However, the following discussion does clarify and supplement the ALJ's analysis of the issue of discriminatory intent as it pertains to the Zinn complaint, and the analysis of the issues of knowledge of protected activity and discriminatory intent as it pertains to the Morris complaint.

DISCUSSION

A. Factual background

Without exception, the findings of fact rendered by the ALJ reflect a thorough review of the record and careful evaluation of the evidence. R. D. and O at 2-31; *see N.L.R.B. v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983); *Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981); *Dobrowlosky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979). I therefore adopt those findings of fact.

As background for the analysis to follow, I note the following points. At the time the events giving rise to these complaints occurred, both Morris and Zinn were scientists at the Missouri University Research Reactor (MURR). R. D. and O. at 2-3. In addition to being the largest research reactor in the United States, MURR engages in the commercial irradiation of targets, an enterprise that generates approximately $6 million annually. R. D. and O. at 2. An error made in the course of shipping radioactive materials from the reactor in July 1992 gave rise to an investigation by the Nuclear Regulatory Commission (NRC) and an enforcement conference was held in October 1992. R. D. and O. at 6. In August 1992, a Shipping Task Force was established to undertake a "global review" of shipping procedures at the reactor in order to pursue, in connection with MURR committees and subcommittees already in place, remedial steps to prevent such shipping errors in the future. *Id.* The July 1992 shipping error had involved reversing the addresses for two shipments, so that one of the addressees received a shipment containing materials having greater radioactivity than was expected. *Id.*

Over the next few months, a controversy developed between Zinn and MURR managers concerning whether the "global review" should address not only the issue of accuracy in addressing shipments but also another issue related to the amount of radioactivity in each shipment leaving the reactor, *viz.*, the accurate description of the targets submitted for irradiation, including any trace elements. R. D. and O. at 6-7,

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32-38. Although he met with resistance on this issue, Zinn was persistent and succeeded in ensuring that the issue of accurately determining target composition was addressed by MURR management in its responses to the NRC in January and March 1993. R. D. and

O. at 7-12; 32-38. During this period, Morris not only privately encouraged Zinn in his efforts regarding the target composition issue but also actively pursued, in committee meetings and otherwise, the need for MURR management to directly confront the issue. He argued that the issue should be addressed fully in the status report filed with the NRC in January 1993 and in the presentations to the NRC investigators during their on-site investigation of March 9 through 11, 1993. R. D. and O. at 11, 13; *see* R. D. and O. at 40-43; n.11, *infra*.

At the close of the on-site investigation, the NRC investigators commended MURR staff for the steps that had been taken toward remedial action concerning the accurate determination of the composition of irradiation targets shipped from the reactor. R. D. and O. at 12. Furthermore, the investigators indicated that such efforts had prevented the reactor from committing very serious, Level 1, violations of the NRC regulations. *Id.*

In February 1993, the MURR Director advised Morris that he would not go forward with the initiation of formal committee consideration of Morris' recommendation of Zinn for promotion from the position of Research Scientist to that of Senior Research Scientist. R. D. and O. at 20-21. On the afternoon of the day that the NRC on-site investigation ended, March 11, 1993, the MURR Director advised Morris that he was being demoted from his position of Nuclear Analysis Program Coordinator and Group Leader of the Nutrition, Epidemiology and Immunology Group. R. D. and O. at 28; MX 31.[4] Zinn had been advised by Morris on February 7 or 8, 1993, of the Director's refusal to initiate Zinn's formal candidacy for promotion. R. D. and O. at 35. Upon being advised of the decision to demote Morris, an action which Zinn felt also adversely affected him, as a scientist within the Nutrition, Epidemiology and Immunology Group headed by Morris, Zinn initiated this complaint under the ERA. ZX 25; T. 215; *see* R. D. and O. at 12, 31. On April 27, 1993, Morris filed his ERA complaint. MX 93; *see* R. D. and O. at 29.

B. The Zinn complaint

The University contends that the ALJ improperly analyzed the issue of discriminatory intent by placing the burden of persuasion on the University. Respondent's Brief at 2-7. Under the burdens of proof and production in "whistleblower" proceedings, a complainant who seeks to rely on circumstantial

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evidence of intentional discriminatory conduct must first make a *prima facie* case of retaliatory action by the respondent, by establishing that he engaged in protected activity, that he was subjected to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 6-9 (citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). Additionally, a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.* If a

complainant succeeds in establishing the foregoing, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. *Dartey*, slip op. at 8.

The complainant bears the ultimate burden of persuading that the respondent's proffered reasons are not the true basis for the adverse action, but are a pretext for discrimination. *Thomas v. Arizona Public Service Co.*, Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 20 (citing *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993)); *see Yellow Freight System, Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994), *aff'g Smith v. Yellow Freight System, Inc.*, Case No. 91-STA-45, Sec. Dec., Mar. 10, 1993. The complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for protected activity. *Thomas*, slip op. at 20; *see Yellow Freight System, Inc.*, 27 F.3d at 1139. Pursuant to Section 211(b)(3) of the ERA, however, if it has been established that the protected activity contributed to the adverse action, the employer must demonstrate by "clear and convincing evidence" that it would have taken the adverse action in the absence of the protected activity. *Dysert v. Florida Power Corp.*, Case No. 93-ERA-21, Sec. Dec., Aug. 7, 1995 (construing Section 211(b) of the ERA, as amended by Section 2902(d) of the Comprehensive National Energy Policy Act of 1992, codified at 42 U.S.C. § 5851(b)(3)), *appeal docketed Dysert v. Sec'y of Labor,* No. 95-3298 (11th Cir. Sept. 28, 1995); *see Johnson v. Bechtel Construction Co.*, Case No. 95-ERA-11, Sec. Dec., Sept. 28, 1995, slip op. at 2.

The ALJ properly concluded that Zinn had established the requisite elements of protected activity, knowledge and adverse action. R. D. and O. at 31-32, 36-37, 40; *see Simon*, 49 F.3d at 389; *Dartey*, slip op. at 7-8. The ALJ also properly concluded that the temporal proximity between Zinn's protected activity, beginning in August 1992 and continuing through the time of the University's refusal in February 1993 to

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initiate formal consideration of Zinn for promotion to the position of Senior Research Scientist, which is the adverse action at issue here, was adequate to support an inference of a causal link between the protected activity and the University's adverse action. R. D. and O. at 40; *see* R. D. and O. at 32-35, 39; *Simon*, 49 F.3d at 389 (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)), 390; *Kahn v. Commonwealth Edison Co.*, Case No. 92-ERA-58, Sec. Dec., Oct. 3, 1994, slip op. at 5-6, *aff'd*, 64 F.3d 271 (7th Cir. 1995).

At hearing, the University offered the testimony of James J. Rhyne (Rhyne), the Director of MURR, in support of its contention that Rhyne's failure to establish a committee to consider Zinn's qualifications for promotion was based on Rhyne's decision that Zinn had failed to meet objective promotion criteria rather than Rhyne's intention to retaliate against Zinn for his protected activity. T. 1034-38, 1056-71; *see* R. D. and O. at 20-25. As the University thus met its burden of articulating a legitimate, nondiscriminatory basis for its action, the analysis shifts to the issue of whether Zinn has demonstrated that such basis is merely pretextual and that the University's action was actually based on a discriminatory motive. *See Yellow Freight System, Inc.*, 27 F.3d at 1139-40; *Pillow v. Bechtel Construction, Inc.*, Case No. 87-ERA-35, Sec. Dec., July 19, 1993, slip op. at 13 (citing *St. Mary's Honor Center,* 113 S.Ct. at 2749, 125 L.Ed. 2d at 419); *Dartey*, slip op. at 6-9.

Zinn may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Pillow*, slip op. at 14; *Dartey*, slip op. at 8. In order to determine that Zinn has established discriminatory intent in regard to this adverse action by the University, however, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center,* 113 S.Ct. at 2749, 125 L.Ed. 2d at 424; *see Yellow Freight System, Inc.*, 27 F.3d at 1139; *Pillow*, slip op. at 14-15. Although found to be pretextual, an employer's stated reasons may nonetheless be found to be a pretext for action other than prohibited discrimination. *See Galbraith v. Northern Telecom*, 944 F.2d 275, 282-83

(6th Cir. 1991). The ultimate inquiry is thus whether Zinn has demonstrated that Rhyne decided not to initiate the formal consideration of Zinn as a candidate for promotion because of Zinn's protected activity regarding safety issues related to shipments to and from the reactor.

Contrary to the University's argument, the ALJ, in analyzing the issue of discriminatory intent toward Zinn, did not improperly shift the burden of persuasion to the University. The ALJ concluded that the promotion criteria cited by Rhyne at hearing were not formally in effect in January and February 1993, "when critical decisions were being made" that culminated in the promotion of another research scientist, Hector Neff (Neff), but not Zinn. R. D. and O. at 39. The ALJ also concluded that "the criteria were more rigorously applied to Dr. Zinn than to Dr. Neff." R. D. and O. at 40. The ALJ thus effectively found the University's contention, that Rhyne based his decision not to initiate the formal consideration of Zinn as a candidate for promotion on objective criteria, to be "not worthy of credence," *see Pillow*, slip op. at 14; *Dartey*, slip op. at 8. This conclusion is fully supported by the record evidence and is therefore accepted. Furthermore, consistent with the holding of the United

States Supreme Court in *St. Mary's Honor Center,* having found the reason articulated by the University to be pretextual, the ALJ proceeded to complete the analysis of the complainant's case by evaluating the evidence of retaliatory animus toward Zinn.[5] R. D. and O. at 40; *see Yellow Freight System, Inc.*, 27 F.3d at 1139; *Thomas,* slip op. at 20. As indicated *supra,* the ALJ also properly considered the temporal proximity between Zinn's raising of concerns about the composition of targets shipped to the reactor for irradiation and Rhyne's decision regarding the question of Zinn's candidacy for promotion. R. D. and O. at 40; *see Simon,* 49 F.3d at 389, 390; *Kahn*, slip op. at 5-6. As indicated by the ALJ, Zinn's pursuit of the target composition concerns became particularly significant in January 1993, when MURR management was preparing a status report for the NRC and there was heated debate among staff members concerning how much

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information should be included regarding the target composition issue. R. D. and O. at 11-12, 13-14, 34-36, 40-41, 42.

I reject the University's contention that, in determining Rhyne's intent, the ALJ erroneously relied on evidence concerning Rhyne's hostility towards Zinn that was manifested after February 1993, when Rhyne made the decision not to initiate formal consideration of Zinn as a candidate for promotion. I further reject the University's contention that hostility towards Zinn that was demonstrated by the Associate Director of MURR, Charles McKibben (McKibben), and the Assistant Director, William Reilly (Reilly), and the services engineer for the reactor, Steve Gunn (Gunn), should not have been relied upon by the ALJ because only Rhyne was responsible for consideration of Zinn's promotion. Respondent's Brief at 8-9. Particularly in view of the close working relationship of the foregoing officers with Rhyne, their superior, *see* R. D. and O. at 36, as well as the evidence of a *pattern* of hostility toward individuals engaged in protected activity that is presented in the record of these consolidated complaints, *see* R. D. and O. at 6-13, 15-20, 34-38, 40, the foregoing evidence further supports the conclusion that the likely cause of Rhyne's refusal to initiate the formal consideration of Zinn for promotion was Zinn's protected activity.

I also reject the University's contention that the ALJ failed to consider "other possible causes" for comments made by Rhyne in his August 1993 personnel evaluation of Zinn, which were found by the ALJ to indicate hostility toward Zinn for his protected activity. In support of this contention, the University cites a legal action filed by Zinn and his wife that did not arise under the ERA and urges that the ALJ should have considered whether the filing of such action in August 1993 contributed to the tone of Rhyne's comments in Zinn's personnel evaluation. Respondent's Brief at 9-10; *see* n.3, *supra*. The ALJ carefully considered Rhyne's admonition to Zinn, in the August 1993 evaluation, regarding Zinn's "antagonistic" and "adversarial" approach to interaction with the "MURR and University administration and to some degree" Zinn's colleagues. R. D. and O. at 35-36, *see* R. D. and O. at 17-18; RX 38. The ALJ then concluded that these comments "echoed

McKibben's complaints pertaining to Zinn's pursuit of the target composition issue" in the August 1992 through March 1993 period. R. D. and O. at 35-36. The inference that Rhyne's comments in the August 1993 evaluation reflect a continuation of the hostility toward Zinn's protected activity prior to February 1993 is reasonable and I adopt it. *See Simon*, 49 F.3d at 390.

Also, as noted by the ALJ, R. D. and O. at 38, Zinn's filing of his complaint under the ERA in April 1993 constitutes

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protected activity. 42 U.S.C. § 5851(a)(1)(D)(1988 & Supp. V 1993). Documentary evidence, as well as testimony at hearing, demonstrates explicit hostility toward Zinn because of the filing of his ERA complaint on the part of at least one member of Rhyne's immediate staff, the Assistant Director, Reilly. ZX 6; T. 876-78; *see* R. D. and O. at 15-17. Such evidence also supports the conclusion that Zinn was subjected to a pattern of hostility by the management at the reactor resulting from his protected activity.

Also contrary to the University's contention, Respondent's Brief at 11-12, the ALJ properly concluded that Rhyne's initiation of the formal promotion process for Neff, in comparison with his contemporaneous adverse decision concerning Zinn's candidacy for promotion, supports the conclusion that Rhyne intentionally discriminated against Zinn. The ALJ credited the testimony of Michael D. Glascock (Glascock), a MURR Senior Research Scientist and Group Leader who had recommended Neff for promotion and who was familiar with the work of both Neff and Zinn, that he considered Zinn to have been as "equally qualified" to be a candidate for promotion as was Neff, T. 76-77; *see* T. 68-75, 79-81, 137-49, 153-58. R. D. and O. at 23. Glascock also discussed the relative qualifications of Neff and Zinn under the requirements contained in the promotion guidelines relied on by the University at hearing, and discussed how Zinn actually met one area of the criteria, the service requirement, that was not met by Neff. T. 72-76.

As noted by the University in its response brief, at 11, Judson D. Sheridan (Sheridan), Vice-Provost and Research Dean for the graduate school at the University of Missouri at Columbia, testified, based on a review at hearing of Zinn's curriculum vitae and June 1992 personnel evaluation, that he did not believe that Zinn met the promotion guidelines. T. 962-70. Sheridan also testified that he had approved Neff's promotion and that he believed that Neff had been qualified under those guidelines, T. 960-63; however, on cross-examination, Sheridan failed to explain that conclusion in view of Neff's failure to meet the service requirement contained in the guidelines, T. 974-75, 978-80. *See also* T. 1066-67, 1097-99 (testimony of Rhyne acknowledging Neff's shortcomings under the promotion guidelines).[6] The record thus supports the ALJ's reliance on the testimony of Glascock to conclude that Rhyne's failure to initiate formal promotion consideration of Zinn was discriminatory.

I also reject the University's contention that the ALJ engaged in a flawed analysis under the "dual motive" doctrine. Under the dual, or mixed, motive doctrine, when the evidence

establishes that discriminatory intent played a role in an adverse action, the employer may avoid liability only by

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demonstrating that the action would have been taken on the basis of a legitimate motive alone. *Yellow Freight System, Inc.*, 27 F.3d at 1137, 1140 (holding that *St. Mary's Honor Center* did not disturb mixed motive doctrine); *Mackowiak*, 735 F.2d at 1163-64 (citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977)[further citations omitted]). Under the dual motive analysis, the employer "bears the risk that 'the influence of legal and illegal motives cannot be separated . . . .'" *Mackowiak*, 735 F.2d at 1164 (quoting *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983)); *see Harrison v. Stone & Webster Engineering Group*, Case No. 93-ERA-44, Sec. Dec., Aug. 22, 1995, slip op. at 9-10; *Pillow*, slip op. at 14-15. Furthermore, as discussed in the Secretary's decision in *Dysert, supra*, the 1992 Amendments to the ERA provide that an employer can escape liability under the dual or mixed motive analysis only by presenting clear and convincing evidence that the adverse action would have been taken in the absence of the protected activity. Section 211(b)(3)(D) of the ERA, codified at 42 U.S.C. § 5851(b)(3)(D); *Dysert*, slip op. at 3-6.

The ALJ found that Rhyne had not acted on a legitimate motive in deciding not to initiate Zinn's formal candidacy for promotion. R. D. and O. at 40. He then concluded by finding that, even if the evidence had established that Rhyne was motivated in part by legitimate factors, the evidence did not establish that Rhyne would have taken the action against Zinn in the absence of Zinn's protected activity. *Id.; see* R. D. and O. at 31-32. Thus, and contrary to the University's contention, the ALJ did not find that the evidence established that Rhyne was motivated even in part by nondiscriminatory factors, *viz.*, the promotion criteria, in taking the adverse personnel action against Zinn.[7] Assuming, *arguendo*, that the dual motive analysis were reached, I agree with the ultimate conclusion of the ALJ and find that clear and convincing evidence does not support a conclusion that Rhyne would have taken the challenged personnel action in the absence of Zinn's protected activity.[8] *See* 42 U.S.C. *§* 5851(b)(3)(D); *Dysert*, slip op. at 3-6; *see also Grogan v. Garner*, 498 U.S. 279 (1991)(discussing higher clear and convincing evidence standard in comparison with preponderance of the evidence standard within context of Section 523(a) of the Bankruptcy Code, 11 U.S.C. § 523(a)); *see generally Director, OWCP v. Greenwich Collieries,* 114 S.Ct. 2251 (1994)(addressing requirement under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

I agree with the ALJ's conclusion that the record establishes that Rhyne's decision not to initiate the formal

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candidacy of Zinn for promotion was motivated by retaliatory intent against Zinn for his protected activity. Zinn has

therefore established that the University violated the ERA in that regard.[9]

C. The Morris complaint

The ALJ properly concluded that Morris had established the requisite elements of protected activity, knowledge and adverse action. R. D. and O. at 28-29, 31-32; *see Simon*, 49 F.3d at 389; *Dartey*, slip op. at 7-8. The ALJ also properly concluded that the temporal proximity between the protected activity engaged in by Morris during January and February 1993 and the decision to demote Morris, which was ultimately reached in February 1993, was adequate to support an inference of a causal link between the protected activity and the University's adverse action. R. D. and O. at 42-43; *see* R. D. and O. at 11, 13, 27, 28; *Simon*, 49 F.3d at 389 (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)), 390; *Kahn*, slip op. at 5-6.

Contrary to the University's contention, Respondent's Brief at 13, the record provides ample support for the ALJ's conclusion that Rhyne possessed the requisite knowledge of Morris' protected activity. McKibben testified that he kept Rhyne informed regarding developments on the Shipping Task Force in a "general" manner. T. 848; *see* R. D. and O. at 6. Although Rhyne's hearing testimony contains neither a denial nor an express acknowledgement that Rhyne was aware of Morris' role in pursuing the target composition concerns that had initially been raised by Zinn,[10] Rhyne did acknowledge that he was kept informed, in a "cursory" manner, of the work of the reactor committees concerning these safety concerns. T. 1116; *see* T. 1050, 1073-78.[11] Rhyne also testified that, although he ordinarily did not become involved in decisions concerning technical NRC licensing matters, he would become involved if there were an "impasse" among specific members of his supervisory staff ordinarily responsible for such matters. T. 1049, 1076-77.

As found by the ALJ, the record indicates that, following the October 1992 NRC enforcement conference, Rhyne and the MURR staff were aware of the potential for loss of the reactor's NRC license and the consequent closing of the reactor. T. 177 (Zinn), 661-63 (Gunn), 722 (Ernst), 843-44 (McKibben), 872, 887-88 (Reilly), 1073 (Rhyne); *see* R. D. and O. at 6. There was extensive discussion concerning the best course to follow to alleviate the NRC concerns that prompted the enforcement conference. T. 180-88, 197 (Zinn), 401-05, 408, 410-11, 445-454, 481-84, (Morris), 561-67 (Meyer), 635-41, 658-59, 675-76 (Gunn), 807-10 (McKibben), 874-76, 883-901 (Reilly); *see* R. D. and O. at 6-13. With regard to Rhyne's knowledge of Zinn's protected activity, the ALJ expressly found that "it is inconceivable" that

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members of Rhyne's immediate staff did not contemporaneously apprise Rhyne of the developments pertaining to Zinn's pursuit of his concerns about target composition. R. D. and O. at 36; *see Simon*, 49 F.3d at 390. The record supports a similar conclusion in regard to Morris' protected activity regarding safety concerns pertaining to shipments to and from the reactor beginning in August 1992. In addition, Morris testified that Rhyne, McKibben and Reilly were present at a meeting of the

Reactor Services Subcommittee on February 1, 1993, at which he expressed concern regarding the target composition issue. T. 446-451; *see* MX 93; n.11, *supra*. I therefore reject the University's contention that Morris failed to establish that Rhyne was aware of Morris' protected activity when Rhyne demoted Morris.

The University also contends that the demotion of Morris was a legitimately motivated personnel action based on the conclusion of Rhyne and other University and MURR officials that the reactor operation was "out of control." Respondent's Brief at 16-17; *see* R. D. and O. at 27-28. The University asserts that the ALJ improperly shifted the burden of persuasion to the University by requiring the University to demonstrate that it was not motivated by retaliatory intent, rather than requiring Morris to establish that the legitimate basis advanced by the University was pretextual. Respondent's Brief at 14-16. The ALJ concluded, in effect, that the record established that the University was motivated in part by retaliatory animus toward Morris for his protected activity and that the University had failed to demonstrate that it would have demoted Morris in the absence of such protected activity. R. D. and O. at 41-43. Although I agree with the foregoing conclusions, it is necessary to

supplement and clarify the ALJ's analysis of the issue of retaliatory intent regarding Morris.

As discussed *supra* in the analysis of the Zinn complaint, a complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Pillow*, slip op. at 14; *Dartey*, slip op. at 8. The ALJ did not find that the basis presented by the University for its demotion action was merely pretextual, however, and the evidence of record does not support such conclusion. Rather, and as found by the ALJ, R. D. and O. at 25-28, 41-42, the record indicates that Morris and Rhyne had experienced increasing friction over various issues concerning the administration of the reactor for more than a year prior to Morris's demotion in March 1993, and that Morris had not established that Rhyne's decision to relieve Morris of his group leader status was not motivated, at least to some degree, by Rhyne's interest in regaining control of administrative matters

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at the reactor.

As the ALJ further concluded, however, the record establishes that Rhyne was also motivated by retaliatory intent against Morris for his protected activity. This conclusion is supported by the sequence of events preceding Rhyne's decision regarding demotion, the evidence of hostility generated by the protected activity engaged in by Morris and Zinn beginning in August 1992, and the evidence indicating that other members of the MURR staff who also actively opposed Rhyne in regard to various administrative matters did not suffer adverse consequences. The foregoing evidence also supports the further conclusion that, under a dual motive analysis, the University has failed to refute Morris' case by establishing by clear and convincing evidence that it would have taken the demotion action in the absence of Morris' protected activity. *See Johnson*, slip op. at 2; *Dysert*, slip op. at 3-6.

Specifically, the record indicates that, although Rhyne had felt an increasing distance developing between himself and Morris since only a few months after Rhyne became Director of the reactor in December 1990, and Rhyne had been concerned for "about a year" regarding Morris' involvement in opposing Rhyne on several administrative issues, Rhyne determined to take adverse action against Morris "around January" or "early February" of 1993. T. 1002, 1009-11, 1041; *see* R. D. and O. at 3, 25-29, 41-42. At that time, Rhyne testified, he had received comments that MURR was "out of control," that "Morris and his group were running the center," and that "there was a lot of dissension going on primarily led by [the] Morris group. . . ." T. 1042-43. As indicated *supra,* Zinn was a member of the Nutrition, Epidemiology and Immunology Group headed by Morris. R. D. and O. at 3. In February 1993, Rhyne discriminatorily decided that he would not initiate Zinn's formal candidacy for promotion. R. D. and O. at 20. This sequence of events supports the inference of a causal connection between Morris' protected activity that began in August 1992 and the February 1993 demotion decision. *See Simon,* 49 F.3d at

389, 390; *Kahn*, slip op. at 5-6. Morris and Zinn engaged in a course of protected activity that began in August 1992 and which was of particular importance in January 1993. Rhyne's reference to the "Morris group," coupled with the temporal proximity between such protected activity and Rhyne's February 1993 decision to demote Morris, further supports the conclusion that retaliatory intent contributed to Rhyne's motivation in demoting Morris. *See generally Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *quoted in Mackowiak,* 735 F.2d at 1162 (addressing the significance of circumstantial evidence in establishing the presence or absence of retaliatory motive).

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I also reject the University's argument, Respondent's Brief at 20, that the record does not provide support for the ALJ's finding, R. D. and O. at 43, that the hostility towards Zinn beginning in August 1992 due to his protected activity "spilled over" to Morris. First, it is important to recognize the very close professional association between Zinn and Morris. Morris had been associated with Zinn, academically and professionally, for approximately ten years at the time the protected activity took place. T. 165-171 (Zinn), 368-70 (Morris). Morris had initially acted as Zinn's academic advisor while Zinn completed a Master's Degree and later served as Zinn's Group Leader. *See id.* As noted by the ALJ, R. D. and O. at 3, Zinn considered Morris to be his mentor. T. 355-56.

As found by the ALJ, the record demonstrates that a considerable degree of hostility was generated among members of Rhyne's immediate staff flowing from the controversy over the target composition safety concerns raised by Zinn and supported by Morris. *See* R. D. and O. at 6-13, 17-20, 32-38. As also found by the ALJ, the effort spearheaded by Zinn forced MURR management "to come to grips with the target composition issue. . . ." R. D. and O. at 38; *see* R. D. and O. at 19 n.5. Some of the opposition to that effort was based on the belief that drawing the NRC's attention to further safety problems related to the shipping of irradiation targets to and from the reactor would further jeopardize the reactor's NRC license. *See* R. D. and O. at 18-19, 32; T. 722 (Ernst), 843-44 (McKibben), 872, 887-88 (Reilly), 1073 (Rhyne).

Reilly's letter of April 30, 1993, which was circulated at the reactor after the filing of Zinn's ERA complaint, reflects a view of Zinn's whistleblower activity as "traitorous." ZX 6; *see* R. D. and O. at 15-17; *see also* T. 84-86 (Glascock), 215-16, 218-19 (Zinn); R. D. and O. at 18-20. Furthermore, the corroborated testimony of Zinn and Morris indicates that, with the exception of Walter Meyer (Meyer), Acting Reactor Manager, Morris alone provided support for Zinn's pursuit of the target composition issue in the committee proceedings taking place at the reactor during the August 1992 through January 1993 timeframe.[12] T. 441-42 (Morris), 232-34 (Zinn), 637-38 (Gunn); *see* T. 566 (Meyer), 807-10 (McKibben), 883-84, 893-94 (Reilly acknowledging Meyer's role in decision to voluntarily provide certain documentation to NRC investigators during March 1993 on-site investigation); R. D. and

O. at 11-12. Contrary to the University's argument, Respondent's Brief at 20, the record thus provides ample support for the ALJ's conclusion that the hostility towards the protected activity engaged in by Zinn beginning in August 1992 "spilled over" to Morris. *See Simon*, 49 F.3d at 390.

Finally, the evidence of record indicates that various other

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staff members at MURR had opposed Rhyne's administrative policies and had actually taken leading roles in doing so. *See, e.g.*, T. 109-21 (Glascock), 745-46 (Erhardt); MX 25 (memorandum of Dr. W. B. Yelon, MURR scientist); *see also* R. D. and O. at 29-31; T. 135-36 (Glascock). Nonetheless, the record does not indicate that any of those individuals were subjected to adverse action; rather, as found by the ALJ, Rhyne offered Glascock the position of Program Coordinator and Group Leader from which Morris had been demoted. T. 121 (Glascock); R. D. and O. at 31-32. In support of its position that Rhyne was not motivated by retaliatory animus against whistleblower activity, the University notes that Meyer had supported pursuit of the target composition issue but suffered no adverse consequences as a result. Respondent's Brief at 18-19; *see* T. 567 (Meyer). This factor does not undermine the well-supported conclusion that Rhyne's demotion decision was motivated, at least in part, by retaliatory animus toward Morris for engaging in protected activity. *See DeFord v. Secy. of Labor,* 700 F.2d 281, 286 (6th Cir. 1983).

Morris thus established by a preponderance of the evidence that the demotion action was in retaliation for protected activity, *Thomas,* slip op. at 20; *see Yellow Freight System, Inc.,* 27 F.3d at 1139; and, the University failed to demonstrate, under Section 211(b)(3) of the ERA, by "clear and convincing evidence" that it would have taken the adverse action in the absence of the protected activity, *see Johnson*, slip op. at 2; Dysert, slip op. at 3-6; *see also Yellow Freight System, Inc.,* 27 F.3d at 1137, 1140 (holding that *St. Mary's Honor Center* did not disturb mixed motive doctrine).

E. Attorneys' fees

Pursuant to the ERA, the Complainants are entitled to payment of attorneys' fees and costs reasonably incurred in bringing the complaint. 42 U.S.C. § 5851(b)(2)(B)(1988 & Supp. V 1993). In a Recommended Decision and Order on Attorney Fees issued October 24, 1994, the ALJ awarded a total of $35,797.71 for attorney's fees and costs to Complainant Zinn and a total of $5,089.22 for attorney's fees and costs to Complainant Morris. In so doing, the ALJ rejected the University's objections to the number of hours and the hourly rate requested by counsel to

Complainant Zinn. The ALJ noted that the University did not object to the fees and costs requested by Complainant Morris.

The ALJ's award of costs and fees to Complainant Zinn was comprised of 196 hours of attorney services at $150.00 per hour, plus 6 hours at lesser hourly rates for services rendered by legal staff affiliated with the counsel's firm, and $6,165.46 for litigation costs. The award of costs and fees to Complainant Morris was comprised of 62 hours of attorney services at $85.00 per hour, and $2,089.22 for litigation costs. A review of the

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record indicates that the ALJ's decision awarding attorneys' fees and costs is in accordance with pertinent law. As found by the ALJ, the larger award to Complainant Zinn's counsel as the lead counsel in the case is appropriate. *See Hensley v. Eckerhart,* 461 U.S. 424 (1983); *see generally Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992, slip op. at 17-28 (addressing various factors to be considered in setting hourly rate and allowing attorneys' fees for services claimed under the ERA). Furthermore, in support of the fee petition, Zinn's counsel provided documentation of the prevailing market rates in the relevant community. *See Blum v. Stenson*, 465 U.S. 886, 895 (1984). The award to Complainant Morris' counsel is also supported by appropriate documentation and in accord with pertinent law. *See Hensley,* 461 U.S. at 433. I therefore adopt the recommended decision of the ALJ concerning attorneys' fees and costs.

ORDER

I affirm the preliminary order for immediate relief that I issued on June 20, 1994,[13] and order additional appropriate relief, *to wit*:

1) The Respondent is ordered to establish a committee to consider Complainant Zinn's suitability for promotion to Senior Research Scientist in accordance with the terms and conditions set forth in the ALJ's Recommended Decision and Order, at 43.

2) If Complainant Zinn is recommended for promotion by such committee, the Respondent is ordered to promote Complainant Zinn in accordance with that recommendation and to reimburse Complainant Zinn in the amount of the differential between the salary of a Research Scientist and that of a Senior Research Scientist for the period from February 4, 1993 to the date of the promotion. Respondent is also ordered to pay Complainant Zinn interest on this back pay award, to be calculated at the rate provided at 26 U.S.C. § 6621 (1988).[14]

3) The Respondent is ordered to reinstate Complainant Morris as Nuclear Analysis Program Coordinator.

4) The Respondent is ordered to reinstate Complainant Morris as the Group Leader of the Nutrition, Epidemiology and Immunology Group or its equivalent.

5) The Respondent is ordered to post on all bulletin boards of the Missouri University Research Reactor, where Respondent's official documents are posted, a copy of this Decision and Order for a period of 60 days, ensuring that it is not altered, defaced or covered by any other material.

6) The Respondent is ordered to pay $40,886.93 in attorneys' fees and litigation costs awarded in this case pursuant to the ALJ's

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1994 and to assume liability for any additional attorneys' fees and costs reasonably incurred to date.
7)Complainants Zinn and Morris are granted a period of 30 days from the date of this order to submit petitions for costs and expenses, including attorneys' fees, not covered by the ALJ's October 24, 1994 Recommended Decision and Order on Attorney Fees.

The Respondent may file a response to such petitions within 60 days of the date of this order.
SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]
Section 211 of the ERA was formerly designated Section 210, but was redesignated pursuant to Section 2902(b) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992.

[2]
The caption reflects the correction of Complainant Morris' name from Steven J. Morris as it appeared on the ALJ's R. D. and O. and on orders issued by the Office of Administrative Appeals. *See* Complainant Morris' Brief at 15; R. D. and O. at 31.

[3]
In response to the Order issued May 4, 1995 by the Director of the Office of Administrative Appeals, the parties have filed a Joint Status Report addressing the impact on these consolidated complaints of an agreement entered into on January 18, 1995, by Zinn and his wife, Dr. Tandra Chaudhuri, with the University. Although that agreement formed the basis for the settlement and dismissal of a complaint filed by Dr. Chaudhuri, *see Chaudhuri v. The Curators of the University of Missouri,* Case No. 94-ERA-42, Sec. Order Approving Settlement and Dismissing Complaint, May 1, 1995, and provides for a limit on the amount of damages recoverable by Zinn in this case, the parties in these

consolidated complaints have indicated that they wish to proceed with the adjudication of these claims filed by Zinn and Morris. Joint Status Report at 2. As the parties have not sought disposition of the Zinn and Morris complaints based on the January 18, 1995 agreement, such agreement is not before me for review in this case. *See* 42 U.S.C. § 5851(b)(2)(A) (Secretary may not terminate a proceeding on the basis of a settlement without the participation and consent of the complainant); *see generally Macktal v. Secy. of Labor,* 923 F.2d 1150 (5th Cir. 1991)(holding that Secretary erred in modifying settlement agreement); *Thompson v. United States Dept. of Labor,* 885 F.2d 551 (9th Cir. 1989)(holding that Secretary's addition of "with prejudice" to the dismissal condition agreed to by the parties was error). I therefore render no ruling on the adequacy of such agreement with regard to Zinn and Morris, *see generally Fuchko and Yunker v. Georgia Power Co.,* Case Nos. 89-ERA-9, 89-ERA-10, Sec. Ord., Mar. 23, 1989, slip op. at 1-2 (addressing standard under which settlements submitted for approval will be reviewed by the Secretary), and consider the January 18, 1995 agreement germane to these consolidated complaints only to the extent that it indicates compliance with the preliminary order for relief issued on June 20, 1994.

[4]
The following abbreviations are used herein for references to the record: Hearing Transcript, T.; Zinn Exhibit, ZX; Morris Exhibit, MX; Respondent's Exhibit, RX.

[5]
When read in context, the ALJ's statement that "The University has not made a convincing case that Zinn was denied promotion consideration for legitimate reasons," R. D. and O. at 40, clearly does not indicate that he placed the burden of persuasion on the University. *See* R. D. and O. at 31-32.

[6]
The University also urges that the ALJ erred in disregarding Rhyne's testimony "that there were other scientists who were at least as qualified for promotion as Zinn" who had also not been promoted. Respondent's Brief at 12. Rhyne's testimony on this point, however, is cursory and merely cites some specific factors that would support the formal candidacy for promotion of each of the other three scientists that are referred to; Rhyne does not provide an overall assessment of any of the scientists under the promotion guidelines. T. 1067-68. Furthermore, documentation to support the University's contention, in the form of the curricula vitae and personnel assessments of such scientists, was not offered in evidence.

[7]
Consequently, the University's contention that, under the court's decision in *Mackowiak,* the ALJ erroneously failed to "sort out the motives" in Zinn's case is wholly without merit.

[8]
The University suggests that a legitimate basis for the University's adverse action toward Zinn would be hostility resulting from "Zinn's method of presentation" of his safety concerns. Respondent's Brief at 8. The facts in this case are clearly distinguishable from those in which the complainant has engaged in disruptive conduct such that a legitimate basis for adverse action exists. *Cf. Gibson v. Arizona Public Service Co.*, Case No. 90-ERA-29, Sec. Dec., Sept. 18, 1995 (complainant participated in "shop bickering" and harassed another employee); *Rainey v. Wayne State Univ.*, Case No. 89-ERA-48, Sec. Dec., Apr. 21, 1994 (complainant created turmoil and disruption unrelated to protected activity and harassed co-workers, who asked for his termination); *see generally Dunham v. Brock*, 794 F.2d 1037 (5th Cir. 1986) and cases cited therein; *Lajoie v. Environmental Management Systems, Inc.*, Case No. 90-STA-31, Sec. Dec., Oct. 27, 1992, slip op. at 10-14, and cases cited therein.

[9]
The University also contends that the ALJ committed reversible error in failing to admit the report, proferred by the University at hearing, *see* T. 956-59, of a task force of three tenured professors from the University faculty who investigated the question of whether Zinn and Morris had been discriminated against by the University. Respondent's Brief at 10-11; *see* [Rejected] RX 17. As indicated by the ALJ at hearing, T. 959, the University's willingness to convene a task force for this purpose, in response to the Complainants' requests, does not provide probative evidence of the University's motivation at the time of the adverse actions here at issue. Furthermore, the questionable reliability of a report authored by the Respondent's employees and the potential for undue prejudice to the Complainants is evident. *Cf. Roadway Express, Inc. v. Brock,* 830 F.2d 179, 181 (11th Cir. 1987)(addressing role of arbitration decisions rendered under collective bargaining agreements as evidence in administrative proceedings). Although, as a general rule, the ALJ should admit such evidence for whatever probative value it does have, *see Fugate v. Tennessee Valley Authority,* Case No. 93-ERA-0009, Sec. Dec., Sept. 6, 1995, slip op. at 3-4 (citing *Builders Steel Co. v. Commissioner of Internal Rev.,* 179 F.2d 377 (8th Cir. 1950)(addressing lessened significance of technical rulings on admissibility of evidence in non-jury trials)), any error by the ALJ in failing to do so in this instance is harmless.

[10]
In addition to Morris' protected activity in January regarding pursuit of the target composition concerns that is referred to by the ALJ, R. D. and O. at 11, 13; T. 409-11, Morris also testified that he raised safety concerns in a meeting of the Shipping Task Force that was held in August 1992, T. 400-01; *see* T. 653-54 (Gunn), and participated in a meeting of the Reactor Services Subcommittee on February 1, 1993, at which he raised objections concerning the issue of irradiation target certification by reactor customers, and also pursued this issue after that meeting, T. 446-54. Furthermore, Morris testified that, once he

was aware of the opposition that Zinn was encountering in the Shipping Task Force, he pursued this subject in meetings of the Reactor Services Subcommittee and the Reactor Safety Subcommittee, of which Morris was a member. T. 442-43. The raising of these concerns would also constitute protected activity under the ERA although, as was found by the ALJ, Morris' activity in regard to the exempt license controversy, R. D. and O. at 14-15, would not be protected under the Act.

[11]
Although evasive on this point, Rhyne's testimony on cross-examination indicates that he was aware of Zinn's disputes with others on the Shipping Task Force and the Irradiation Sub-committee. T. 1073-74; *see also* T. 1070 (Rhyne's statement that he "barely knew about" Zinn's activity on the task force and sub-committee).

[12]
Although Glascock testified in support of the view that the target composition concerns pursued by Zinn and Morris were of considerable significance, T. 86-91, he was apparently not a member of the Shipping Task Force or the Irradiation Subcommittee, T. 81-91.

[13]
As indicated in n.3, *supra*, the settlement agreement dated January 18, 1995 indicates compliance with some of the provisions of the Preliminary Order of June 20, 1994 with regard to Complainant Zinn.

[14]
See Johnson v. Bechtel Construction Co., Case No. 95-ERA-0011, Sec. Dec. (Sept. 28, 1995), slip op. at 2-3.